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IN THE

Supreme Court of the United States

October Term, 1950

No.

BANK OF AMERICA NATIONAL SAVINGS AND TRUST ASSOCIATION, AND L. M. GIANNINI, *Petitioners*,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review orders of the United States Court of Appeals for the Ninth Circuit, issued June 23 and June 24, 1950, granting a temporary restraining order and an injunction against petitioners, and an order of that court, issued July 13, 1950, adjudging petitioners guilty of civil contempt of the aforesaid orders and impliedly refusing to dissolve said orders of June 23 and 24, 1950.

Opinions Below.

The court below issued two opinions. On June 27, it issued an opinion relating to the issuance of its injunction order of June 24, 1950 (R. 72-82). On July 10, 1950, the court issued its opinion with respect to the contempt proceedings and motions to vacate the injunction order (R. 155-166). These opinions are unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Does a United States Court of Appeals have authority to issue an injunction on original petition of an administrative agency in alleged aid of uncompleted proceedings pending before that agency, in which no findings or order of any kind have been made by the agency?

2. If the Court of Appeals has such jurisdiction, may it issue an injunction against persons not parties to the adminstrative proceeding, on the mere showing by the agency of the pendency of the administrative proceeding and without requiring a prima facie showing that there has been a violation of law and that injury will in fact result to the public interest unless the injunction is issued?

3. May transfers of assets unaccompanied by acquisitions of stock be enjoined in aid of an uncompleted proceeding under Section 7 of the Clayton Act?

4. May the Federal Reserve Board seek and obtain relief having the effect of requiring petitioner Bank of America not to establish bank branches whose establishment has been specifically authorized by the Comptroller of the Currency?

We also adopt the questions presented in the petition of Transamerica Corporation filed in this Court petitioning for a writ of certiorari from the same orders review of which is sought herein.

Statutes Involved.

The pertinent provisions of Sections 7 and 11 of the Clayton Act and the pertinent provisions of the banking laws, relating to the jurisdiction of the Comptroller of the Currency, are printed in Appendix A to this petition.

STATEMENT OF THE CASE.

In the proceeding below the Court of Appeals exercised the original jurisdiction of a court of equity on a petition filed with it by the Board of Governors of the Federal Reserve System (R. 74, 75, 3-7).

The Board has pending before it an uncompleted proceeding under Section 7 of the Clayton Act against Transamerica C rporation in which no order of any kind has been entered. It filed an original petition in the Court of Appeals for the Ninth Circuit against Transamerica Corporation and also against Bank of America although the Bank was not a party to the administrative proceedings. The petition sought and the Court granted an injunction against the acquisition by the Bank of America of the assets of 22 banks in California. Transamerica owns a majority of the stock of these 22 banks (R. 3, 4, 301) and 11% of the stock of Bank of America (R. 305, 309).

The assets having already been acquired, the court issued a subsequent order compelling the petitioner Bank of America to restore them to the original owners (R. 176). The court further enjoined petitioner from operating branches the establishment of which had been approved by the Comptroller of the Currency at the locations of the 22 banks whose assets had been purchased (R. 174-177, 612). The rights of the petitioner thus seized and sequestered are valued in millions of dollars.

The injunction was entered, as we shall show, without color of jurisdiction and without any showing of illegality or of even a prima facie case that the transactions might be contrary to law. The injunction was issued solely on a

showing that an administrative proceeding under Section 7 of the Clayton Act was pending before the Board against Transamerica Corporation (R. 1-7, 81). The Board's theory was that the selling banks' disposal of their assets might frustrate a possible future effort by the Board to compel Transamerica to dispose of its stock in the 22 banks (R. 77).

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The petitioner Bank of America National Trust and Saving Association, hereinafter referred to as Bank of America, is a national banking association operating in the State of California. Petitioner L. M. Giannini is its president. Bank of America is an important competitive force in the world of banking credit and finance. It has grown as a result of policies and methods particularly designed to serve workingmen and small businessmen. Today it serves more than 4,250,000 deposit accounts of which more than 2,000,000 have average bank balances of $100 or less (R. 349). This has required the operation of a system of branches throughout the State of California including many small communities which could not adequately be served by a separate unit bank. Each such branch has been opened with the approval of the Comptroller of the Currency, whose duty it is to make an exhaustive investigation not only of the financial character and ability of each branch, but also of the effect of the acquisition of said branches in maintaining competition in the banking field. 12 U. S. C. § 36, 12 C. F. R. § 4.5.

In accordance with its long established policy of competitive development of a branch banking system which can offer the public statewide service, Bank of America since January 1945 had sought and prepared to acquire the assets of various of the twenty-two banks involved in the court's injunction and operate branches at the locations of those banks.

It had filed applications for this purpose with the Comptroller of the Currency (R. 258-260). In the early months of 1950, the Comptroller had made a thor-

ough investigation of these applications (R. 260-261, 254). On April 14, 1950, he determined to grant permits to conduct branches of petitioner bank at the location of each of the selling banks, and committed himself to issue the necessary permits on condition that the petitioner bank first complete the raising of $70,000,000 of additional capital (R. 37, 64, 65).

Relying on the Comptroller's announced intention to grant the permits, Bank of America floated an issue of over $71,000,000 of its stock by public subscription. 125,000 members of the investing public subscribed to this stock on the representation that the funds raised would be used in part to acquire additional branches (R. 37, 263-265). Binding contracts to purchase the assets and banking businesses of the 22 banks were entered into. These were contracts of present sale (R. 40-43, 33, 54-57, 34). Formal permits from the Comptroller of the Currency (R. 34, 60, 66-68) and the Superintendent of Banks of the State of California (R. 32, 39, 40) were received. All of these actions took place before the restraining order herein was served at 4 P.M. on Friday June 23, but in the case of the state banks, the approval of the State Superintendent of Banks provided that title would pass at the close of business Saturday, June 24.

By the time the restraining order was issued on Friday, June 23, Bank of America had notified the 130,000 depositors or the selling banks that on the following Monday these 22 banks would open as branches of the Bank of America (R. 34-36, 60-62, 272) and the personnel of the banks had been trained by Bank of America supervisors in methods of operation as a branch bank (R. 337, 325, 297).

From the beginning of these transactions the Federal Reserve Board had full knowledge of the contemplated purchases. In April, over two months before it filed its petition in the Court of Appeals, the Board had been notified by the Comptroller of the Currency of his intention to approve the operation of branches at the locations in question (R. 255).

The first notice received by petitioners of any objection by the Board was the service of the temporary restraining order at 4:00 p.m. on June 23, 1950 (R. 335, 336, 281, 282).

For two years, i.e., since June 1948, there had been pending before the Board a complaint against Transamerica, a holding company which owns stock in companies engaged in diverse businesses, including various banks. The alleged purpose of the complaint was to require Transamerica to show cause why it should not divest itself "of any or all" of the stock it held in certain banks including, among others, the selling banks and Bank of America, on the theory that such stock might be found to be held in violation of Section 7 of the Clayton Act (R. 3, 4, 24, 25). Hearings have been held but the taking of testimony has not been concluded (R. 4). No findings or orders have been made (R. 6, 7, 70).

Bank of America is not a party to the proceedings before the Board (R. 3-4, 7-9, 24-25, 142).

After delaying until the purchase by Bank of America was complete, the Board on Friday afternoon, June 23, 1950, obtained without notice an *ex parte* temporary restraining order from three judges of the Court of Appeals for the Ninth Circuit. The next day, Saturday, June 24, 1950, the court convened, heard argument on a motion to dissolve the restraining order, and at 7:00 o'clock Saturday evening it issued an injunction order (R. 284). The injunction restrained Bank of America from "consummating or effectuating any arrangements or undertaking which would result in Bank of America acquiring any or all of the assets or banking business" of the selling banks until a final order was entered in the administrative proceedings against Transamerica (R. 70).

When the restraining order was served it was impossible to reconstitute the banks and reopen them under their former ownership by Monday morning (R. 336, 342, 343, 350, 351). The court at the Saturday hearing indicated it did not intend to require that anything be undone (R. 530). Bank of America interpreted the order to per-

mit it to open its newly authorized branches. It felt and was advised by counsel that no other interpretation was conceivable in view of the facts, the language of the court's order, and the public injury and apprehension which might follow failure to open the banks (R. 350, 351, 282-290). Other steps incidental to the acquisition which remained to be done, such as recording of deeds and the payment of the purchase price were suspended (R. 287, 132-135).

On Tuesday, June 27, 1950, the court cited petitioners as well as Transamerica and its president Mr. Husbands in civil and criminal contempt (R. 90, 91). On July 13, 1950 it issued its civil contempt order which required Bank of America to surrender the possession of the assets which it had purchased and required Transamerica to reconstitute the 22 banks as separate units (R. 173-177). This has been done (R. 646, 647).

The "Evidence" on which the Court Acted.

The entire factual showing of the Federal Reserve Board in connection with the proceedings for restraining order and injunction consisted of its written petition, verified on information and belief by counsel for the Board (R. 3-7), attached to this petition as Appendix B. A mere reading of the brief petition indicates not even a pretense of making a prima facie showing of the need for or right to an injunction. The only statements of fact contained in that application are the following:

(1) That the Board has charged Transamerica with violation of the Clayton Act in acquiring stock of certain specified banks including Bank of America, and has notified Transamerica to show cause why it should not be ordered to cease the alleged violations and divest itself of some or all of the specified bank stocks.

(2) That hearings are not completed.

(3) That the Bank of America unless restrained will on or before Monday, June 26, 1950, acquire the assets and deposit liabilities and thereby take over the banking businesses of 22 banks which are listed in the petition.

(4) That the acquisition of the assets and businesses of these banks will deprive the Board and the court of their respective jurisdictions "upon appropriate findings" to order Transamerica to divest itself of some or all of its stock in such banks in such a manner as to restore "actual and effective competition."

(5) That the Board is without statutory authority to protect its jurisdiction by its own order.

To this petition for injunction the Board attached the complaint and amended complaint against Transamerica pending before the Board, neither of which was verified. On this showing alone, the temporary restraining order was issued *ex parte*.

On the following day, Saturday, June 24, Bank of America moved to dissolve the restraints (R. 27-29). This motion was denied and on the same day the court issued an injunction in the same terms as the restraining order without any additional showing by the Board (R. 68-71). Subsequently on July 3, Bank of America filed its answer to the contempt petition and moved to dismiss the petition for injunction (R. 147). Among other grounds it specified the total absence of proof of any kind that any violation of law had occurred or that Bank of America had been a party to any of the alleged violations charged in the complaint against Transamerica but not yet proved at the hearings (R. 139-140, 142-144). It went further and by uncontradicted affidavits established that the proceedings before the Board would not be affected by the consummation of the transactions. It sought to take depositions and to produce witnesses who could be cross-examined by the Board (R. 92-96). This was denied (R. 102, 103).

Among the affidavits presented was one from the Comptroller of the Currency stating that he had made extensive examination of the competitive situation created by the acquisition of the 22 banks involved and their operation as branches of the Bank of America; that his records indicated that the Federal Reserve Board was kept generally informed of the status of the applications of Bank of America to establish branches and that the Board had been "notified at least as early as the middle of April, 1950, of the [Comptroller's] intention to grant the branch permits . . " (R. 254, 255). A copy of the Comptroller's affidavit is hereto attached as Appendix C.

Other affidavits filed by the Bank of America and Transamerica showed in considerable detail that the injunction order was not either necessary or appropriate in aid of the administrative proceeding. They established, among other things,

(1) that the Board's counsel had admitted on the record in the administrative proceeding that there was no showing of abuse or monopoly by Transamerica Corporation, but had built his case on a theory of tendency of monopoly in the future (R. 291-292);

(2) that in the administrative proceeding, the Board's counsel had limited his proof to evidence designed to justify preventing Transamerica from acquiring stock in additional banks and that he had adduced no proof designed to establish the necessity for divesting Transamerica of any of its existing bank stockholdings, including its stock in the 22 banks and its 11% investment in petitioner bank (R. 292-293);

(3) that Transamerica did not have any power to control Bank of America in any way and was merely one stockholder owning 11% stock interest in petitioner bank (R. 339, 305, 308, *cf.* 291);

(4) that no substantial lessening of competition would result from the sale of the assets of the 22 banks (R. 340, 254, 255); and

(5) that irreparable injury would be done to petitioner bank, to the selling banks, to Transamerica and to investors and depositors if the injunction was permitted to remain outstanding (R. 32, 33, 37-38, 256-275).

No contrary evidence on any of these points was submitted by the Board. The only showing on the part of the Board was the petition itself, verified on information and belief by the Board's counsel. (Appendix B to this petition.) (There were some other affidavits presented by the Board in connection with the contempt proceeding (R. 177-253), but they dealt only with the issue of compliance with the court's order and the court specifically stated it did not rely on those affidavits (R. 165-166).)

Conclusions of the Court.

The court relied entirely, in support of its orders, on the fact that an uncompleted proceeding was pending before the Board in which the Board might at some future time attempt to enter an order, the operation of which might be obstructed by the transaction in issue. There were no findings that the sale of the assets of the 22 banks to Bank of America was in any way illegal. There were no findings that Transamerica controlled Bank of America. Indeed, as the court conceded, there was no evidence before it which could conceivably support such findings (R. 81). The sole finding upon which the court's orders depended was that the administrative proceedings were in process.

In response to the contentions of the Bank that an injunction could not be issued because the transactions had been completed, the Court found that the Bank had not actually taken possession of the assets at the time the restraining order was issued (R. 73, 74).

With respect to the clear interference with the jurisdiction of the Comptroller of the Currency involved in the injunctive orders, the Court, in its opinion of June 27, disclosed that it was proceeding on a plainly erroneous understanding of the facts. The Court said:

> "The facts do show an unfortunate working at cross purposes of two government agencies. What we say is not to be taken as a criticism of the Comptroller for thus apparently lending aid to an attempted evasion of the order of the Board of Governors. Apparently the Comptroller felt obliged to issue these certificates in return for an agreement of the respondent bank to increase its capitalization to a figure which he thought necessary in the public interest. Doubtless the Comptroller deplored a state of the law which reduced him to this expedient. But in making his decision he neither considered, nor was charged with determining, any of the issues committed to the Board of Governors." (R. 80).

The Comptroller's affidavit, filed on July 5, showed that this statement of the Court was clearly unwarranted. There was absolutely no basis for the court's assertion that the Comptroller "felt obliged" to issue the permits in return for an agreement of the Bank to increase its capitalization. Rather it appears that the Comptroller thought the increase in capital was a desirable prerequisite to the authorization of additional branches which he had approved in the public interest, after investigation (R. 254, 255).

The Comptroller's affidavit showed the most careful consideration by him of the public interest, including not only the capitalization of the bank but the situation which each branch created with respect to competition with existing banking facilities. He plainly stated that he gave consideration to "the rights of existing banking facilities to remain undisturbed and free from additional competition . . . " and carefully weighed this against the rights of the prospective branch "to be permitted to enter the area as a competing unit" (R. 255).

Despite this uncontradicted affidavit of the Comptroller of the Currency, the court did not in its subsequent opinion of July 10, revise or correct its finding with respect to these vital issues.

The court was equally misinformed in its finding, in its opinion of June 27, that the Board had acted with due diligence in filing its petition for a restraining order and injunction. The court chose to believe that the Board first received notice of the Comptroller's intention to issue the permits on June 14, only nine days before it filed its petition for a restraining order (R. 80). As the affidavit of the Comptroller filed on July 5 shows, the Board received such notice at least as early as the middle of April—over two months before its petition was filed (R. 255). In its subsequent opinion of July 10, the court admitted its error in this respect but stated merely that the Board's delay in acting went "only to a balancing of conveniences . . . " (R. 165).

Again, in its first opinion of June 27, the Court found that Bank of America and Transamerica proceeded with "unseemly haste" to consummate the acquisition (R. 81). The court completely disregarded the uncontradicted evidence that the acquisition had been in process and a matter of public knowledge for many months (R. 37, 38, *cf.* 257-268).

The court conceded that there was no showing that any order against Transamerica or affecting Bank of America could reasonably be anticipated in the proceedings before the Board. The mere possibility that such an order might ultimately be issued was held to be sufficient basis for the relief granted. The court said:

> "The facts with which the Board is dealing are not before us. Nor do we assume that the Board will ultimately find that the stock acquisitions of which complaint has been made are such as will substantially lessen competition, or tend to monopoly. But we cannot assume that such results could not appear."

On this basis the court annulled valuable contracts to purchase bank assets, and in effect set aside the ruling of the Comptroller of the Currency.

Opinions of the Court Below.

The court below wrote two opinions, one on June 27 with respect to the granting of the injunction order of June 24 (R. 72-82) and the other on July 10 with respect to contempt and the motion to dissolve the injunction (R. 155-166).

In its first opinion, it based its jurisdiction on the all writs section (28 U. S. C., Sec. 1651). It held that since a final order of the Board against Transamerica might be enforced or reviewed in the Ninth Circuit (or in the Third Circuit), its enforcing jurisdiction gave it the right even prior to a final order to enjoin transactions which might conceivably affect the jurisdiction of the Board and the resulting enforcing jurisdiction of the court after final order (R. 75-77). It held that the Board "in case it finds the same warranted" might compel Transamerica to divest its stock in the selling banks in such a way that the assets and banking businesses should not come into the possession of the Bank of America, citing *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554. It further was of the opinion that, under applicable decisions of this court (*Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587) any such power of the Board would be lost if the sale of assets here involved should be consummated before the Board issued a final order (R. 77).

In its second opinion on July 10, 1950, the court dismissed the criminal contempt but found petitioners as well as Transamerica and its president guilty of civil contempt (R. 166). The court reaffirmed its claim to jurisdiction, relying on *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (C. A. 2, 1948) (R. 165).

Specifications of Error.

Petitioners adopt all the specifications of error set out in the petition of Transamerica for certiorari filed in this case. Petitioners desire, however, to emphasize certain

errors of particular consequence from their own point of view.

1. The court erred in assuming under the all writs section powers of a court of general equity jurisdiction to issue an injunction on original petition in alleged aid of an order which the Board has not yet made in a proceeding to which these petitioners were not parties.

2. The court erred in setting aside petitioner bank's binding contracts in the absence of any factual justification.

3. The court erred in holding that petitioner bank could be enjoined from acquiring assets and operating branches at locations for which the Comptroller of the Currency had granted permits to petitioner bank.

4. The court erred in holding that the public interest and balance of convenience required the invasion of property and contract rights particularly after the administrative tribunal had knowingly permitted transactions which it sought to enjoin to ripen into binding contracts, performance under which was substantially complete.

5. The court erred in holding that it had power, in aid of an administrative agency's asserted jurisdiction to enter a future order, to prohibit petitioners who are not parties to the agency's proceedings from exercising valuable rights under a binding contract.

Reasons for Granting the Writ.

I. The decision below is a revolutionary departure from the well-established principle that a temporary injunction will not be issued in the absence of a factual showing that the party seeking the injunction has at least a prima facie case of violation of law and irreparable injury. Here the court deprived Bank of America of assets it had purchased for approximately $19,000,000 without any showing other than the fact that an administrative proceeding was pend-

ing against the majority stockholder of the sellers, seeking entirely different relief.

If this be the law, any court may grant an injunction to an administrative agency upon a mere showing that the agency has a proceeding pending before itself. On the representation of any prosecuting officer of an administrative agency that a complaint has been brought before that agency, all that the court need do is to examine the complaint. Under this decision it may then enjoin any and all transactions either by parties to the administrative proceeding or outsiders if the unsupported allegations of the complaint are broad enough to permit the possibility of some ultimate relief against some of the parties.

The Attorney General has concurrent power to enforce the Clayton Act (15 U. S. C. §15). Had he filed suit in a District Court making the same allegations as the Federal Reserve Board did in its administrative complaint and its petition to the Court of Appeals, it is plain that he could not have obtained an injunction without (1) an affirmative showing sufficient to establish a prima facie case against the defendants, and (2) a showing that a final order to which the government was prima facie entitled would be frustrated if an injunction were not issued. *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212, 219, citing *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 377, where this court said: "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be 'a definite factual showing of illegality,' *Standard Oil Co.* v. *U. S.*, 283 U. S. page 179." See also in the lower courts: *United States* v. *Schine Chain Theatres*, 31 F. Supp. 270 (W. D. N. Y., 1940); *Lowe* v. *Consolidated Edison Company*, 67 F. Supp. 287 (S. D. N. Y., 1941); *U. S.* v. *Bausch & Lomb Optical Co.*, 3 F. R. D. 331 (S. D. N. Y., 1943). Cf. *United States* v. *Columbia Steel Co.*, 71 F. Supp. 734 (D. Del., 1947).

In granting the injunction, the court below appeared to believe that it had the general equity powers of a district court. It apparently felt, however, that it was free to act without the factual showing required when a District Court exercises the drastic power of injunction. Thus, the court relied upon *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (CCA 2d, 1948) which involved an injunctive order issued by a district court, ancillary to a Maritime Commission proceeding, but ignored the fact that the showing of a probable violation of law and of irreparable injury in the *Seatrain* case was so clear that the findings of the court to that effect could not seriously be contested.

Here the court does not even assert a probability that a violation of law will be proved against either Bank of America or Transamerica. The court insists that the mere possibility of such proof being produced in the future in a proceeding to which Bank of America is not even a party is all that is necessary to deprive the bank of its property, as appears in the following language:

> "The facts with which the Board is dealing are not before us. Nor do we assume that the Board will ultimately find that the stock acquisitions of which complaint has been made are such as will substantially lessen competition, or tend to monopoly. But we cannot assume that such results could not appear." (R. 81)

To this the court might well have added that the "facts" were not yet even before the Board, for none have yet been found or reported to it.

Compare the quoted language with a conventional statement of the established rule:

> "Injunctions go only in cases of urgent necessity, made to appear by competent, material, credible, and preponderating evidence, to guard against injuries, not merely feared by the applicant, but reasonably to be apprehended, and likely to be irreparable."

Great Northern Ry. Co. v. *Local G. F. L. of I. A. of M.*, 283 Fed. 557, 563 (D. Mont., 1922).[1] See also this Court's rulings in *Appalachian Coals Inc.* v. *United States* and *Standard Oil Co.* v. *United States, supra.*

In the case of *Hecht Co.* v. *Bowles*, 321 U. S. 321, this Court refused to permit an injunction even where specifically authorized by the Price Control Act, since there was no showing of necessity in accordance with established principles of equity.

Unless reversed by this Court, the decision below makes it possible for administrative agencies to freeze business transactions during the pendency of administrative proceedings without any showing whatsoever. It authorizes the courts without regard to established principles of equitable jurisdiction to act as mere messengers for the administrative branch of the government. It further deprives the citizen of the protection of his property rights under es-

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[1] In *Guaranty Trust Co. of New York* v. *Henwood*, 86 F. 2d 347, 354 (CCA 8th, 1936), the Court, in remanding the cause to the lower court to dissolve an injunction improvidently granted, stated:

> "General allegations in a complaint or in affidavits stating the judgment, opinion, or conclusion of the pleader are insufficient as a basis for an injunction. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 34 S. Ct. 48, 58 L. Ed. 229. Appellee had the burden of proof to show the necessity for an injunction, and this could only be sustained by competent, material, and credible evidence. Facts, not conclusions or opinions, must be stated upon which the court may base its judgment, according to established principles governing equitable relief by injunction."

See also *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924 (CCA 3rd, 1937); *Walling* v. *Associated Truck Lines*, 57 F. Supp. 943 (D. C., W. D. Mich., S. D., 1944); *U. S.* v. *Rogles*, 9 F. Supp. 857 (D. C. E. D. Mo., E. D., 1935); *Henderson Co.* v. *Thompson*, 12 F. Supp. 519 (D. C., W. D. Texas, Austin Div., 1935); *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers of America, et al.*, 15 F. 2d 16 (CCA 3rd, 1926), cert. den. 273 U. S. 748; *Bowles* v. *Minish, et al.*, 56 F. Supp. 153 (D. C. S. D. Ala., S. D., 1944) *Anargyros & Co.* v. *Anargyros*, 167 Fed. 753 (CCA 9th, 1909); *Hall Signal Co., et al.* v. *General Ry. Signal Co., et al.*, 153 Fed. 907 (CCA 2nd, 1907).

tablished rules of equity which require a showing of probable cause as a condition to equitable relief.

The right to similar relief was denied by this Court in the *DeBeers* case, *supra*, where at pages 222 and 223 of 325 U. S. this Court said:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, *on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree.* . . . No relief of this character has been thought justified in the long history of equity jurisprudence." (Emphasis supplied)

We submit that the decision below is an unprecedented taking of private property without fair hearing or factual showing of any kind, and is in conflict with the decisions of this Court. It should not be permitted to stand as the controlling authority for the Ninth Circuit, or as a precedent in other circuits.

II. This case presents an attempt by a United States Court of Appeals to assume the original equity powers of a court of general jurisdiction, in contravention of the established rule that Courts of Appeals are courts of limited jurisdiction. The court below has issued a writ of injunction on the original petition of the Board relying for its presumed authority on the all writs section of the Judical Code (28 U.S.C. § 1651). Its theory was that since it might have jurisdiction to enforce a final order of the Board, it could enter an injunction upon petition of the Board presumably in aid of an order that the Board might attempt to issue at some later date when its proceedings are concluded.

The court below erroneously assumed that it (i.e., a Court of Appeals) was "the only court vested with enforcement of this Act" (R. 76) and that if it did not assume jurisdiction "no court could do anything" (R. 78). The only case in point, however, to which it referred was *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc., supra,* which was a proceeding in a District Court and not a Court of Appeals.

This is the first time that a United States Court of Appeals has issued a writ of injunction on original petition of an administrative agency prior to the final order of the agency. We believe that in so doing the court has ignored the decisions of this Court and has attempted to assert original equity jurisdiction, which is conferred by statute only on the District Courts. This Court has established that Courts of Appeals are courts of limited jurisdiction. In *AFL* v. *NLRB,* 308 U. S. 401, 404, this Court stated:

> "The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U. S. C. § 41, 28 U. S. C. A. § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10(f), which gives a right of review to 'any person aggrieved by a final order of the Board', determines the nature and scope of the review by the court of appeals."

The procedure for review or enforcement of a Board order under Section 11 of the Clayton Act is almost identical with that of the review of orders of the Labor Board and of various other administrative agencies. Section 11 gives the Courts of Appeals specific delegated jurisdiction

on petition to enforce or review the final orders of an administrative agency. The section grants them no other or further authority. It gives no jurisdiction to entertain original petitions before final order of the Board. Thus, Courts of Appeals have no power to enter any orders in respect of administrative proceedings except after petition has been filed to review or enforce a final order. Until that time they have no "jurisdiction" to aid or protect under the all writs section.

That Courts of Appeals may not use the all writs section to entertain jurisdiction prior to final order was decided by this Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. And even after jurisdiction of the Court of Appeals has attached by the filing of a petition to review, that jurisdiction is severely limited. In *Ex parte NLRB*, 304 U. S. 486, it was held that the Court of Appeals could not enjoin action which would defeat its jurisdiction, i.e, vacation of the order of the Labor Board.

The decision below is in conflict with these decisions and should be reviewed by this Court.

The court below held that it had power to issue these orders under the all writs section prior to the filing of a petition to review or enforce. In doing so, it relied on cases involving the appellate jurisdiction of courts of appeals over district courts and holding that writs may issue to district courts before an appeal is filed. (R. 75, 76) The court held that this principle applied also in aid of its "original jurisdiction", on petition to review administrative findings. (R. 76). This is, of course, a *non sequitur*. As this Court said in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144:

> ". . . to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation

and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."[2]

Courts of Appeals having no general equity powers are not equipped, as are District Courts, with the procedural mechanism to issue peremptory and interlocutory orders while protecting the rights of the parties before them. They do not have rules of trial procedure. They are not accustomed or equipped to try issues of fact. They are also faced with other problems which District Courts do not face. In the present case, for example, the Court of Appeals was concerned with the fact that review and enforcement might be had in the Third Circuit as well as the Ninth Circuit. Accordingly, it was not certain whether the injunction was in aid of its own jurisdiction or the jurisdiction of the Third Circuit. Of course, under the all writs section, the court's right to issue writs is only in aid of its own jurisdiction (28 U. S. C. § 1651). The court below resolved this conflict in favor of its own power only because it seemed that not to act was "to say that under the circumstances no court could do anything". (R. 78) This reasoning ignored the fact that District Courts were available with general equity jurisdiction to grant any extraordinary interim relief which might be necessary and appropriate. See *e.g.* 28 U. S. C. § 1337. Such a remedy was afforded by a District Court in *West India Fruit &*

[2] The Court there also commented (at page 141):

"A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution."

Steamship Co. v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (CA 2nd, 1948), *supra*. Curiously enough it was that case which the court below used to justify its own assumption of equity jurisdiction.

On the jurisdiction of District Courts to prevent irreparable injury prior to final order in an administrative proceeding, see also *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56 and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498.

The court below purported to act in aid of a jurisdiction which it did not have and which it may never acquire. In doing so, it created in the Courts of Appeals a forum to which administrative agencies may be expected to resort frequently. If such jurisdiction of the Courts of Appeals is sustained, it should be equally available to parties before the administrative agencies. Opening the door to such litigation would place the Supreme Court in the position of the only reviewing court. This would impose a greater burden on this Court in the exercise of its jurisdiction on certiorari, for where the original decision is by a Court of Appeals and no other appellate review has been had, the considerations for granting review are especially pressing. The procedure of compelling resort to District Courts and limiting Courts of Appeals to their statutory jurisdiction is a well considered one and should not be altered. To allow the decision of the court below to stand would have important consequences adverse to the proper relation of the courts to administrative agencies.

III. The decision of the court below is in conflict with the decision of this Court in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587.

(a) The *Arrow-Hart* case holds that an acquisition of assets during the pendency of administrative proceedings under Section 7 of the Clayton Act may not be ordered

reversed by the Federal Trade Commission. It plainly states that such acquisitions are beyond the purview of the Clayton Act and within the jurisdiction only of the courts under the Sherman Act. The court below has held that the mere pendency of administrative proceedings under Section 7 authorizes and requires the issuance of an injunction without any showing of probable violation of law. Accordingly, under this decision, all that is necessary to avoid the *Arrow-Hart* case is for the administrative agency to seek interim relief from a court of appeals. An injunction will automatically be granted upon the showing merely of the pendency of the administrative proceeding. The result will be to construe the Clayton Act to give the Federal Trade Commission control over the sale of assets,—a result this Court in the *Arrow-Hart* case has held Congress did not intend, and which the Congress has refused to grant to the Federal Trade Commission despite repeated requests.[3] This Court should insist that the requests of administrative agencies for power to control sales of assets should be addressed in the future as they have in the past, to the Congress and not to the courts.

(b) Plainly the *Arrow-Hart* case means that the pendency of administrative proceedings under the Clayton Act is not a bar to sales of assets. Yet in the present case such a sale has been enjoined.

There is no difference in principle between the substantially performed contracts of sale executed before the court's order here and the complete acquisition of the assets in the *Arrow-Hart* case. Here formal contracts were entered into and the selling banks had taken all action necessary to complete the transfer, before the restraining order was issued. The contracts here involved are sales of assets within the *Arrow-Hart* case.

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[3] See e. g. F. T. C. Annual Reports 1939, pp. 14-16, 1940, pp. 12, 13, 1941, pp. 19, 20; T. N. E. C. Final Report, S. Doc. 35, 77th Cong. 1st Sess. pp. 38-40; H. R. 2734, 81st Cong., 1st Sess., and H. Rept. No. 1191 thereon.

(c) Even if the Board should make a final order requiring divestment by Transamerica of the stock of the 22 banks, it could not require those banks to refuse to perform binding contracts for the sale of their assets entered into before any final order of the Board. As this Court said in *Thatcher Manufacturing Company* v. *F. T. C.*, 272 U. S. 554, 561: " . . . When the Commission institutes a proceeding based upon the holding of stock contrary to section 7 of the Clayton Act, its power is limited by section 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it." For sales of assets contended to be unlawful ". . . a remedy is provided through the courts. [Citing the Sherman Act and Sections 4, 15 and 16 of the Clayton Act] . . ."

Under *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, a final order of the Board could, in an appropriate situation, restrict the sale of "assets underlying the stock" (R. 77) as incidental to an order for divestment of stock. This does not mean, however, that such an order could reach assets already sold or subject to a contract of sale. For in such a case the stock no longer represents control of such assets and those assets are no longer "assets underlying the stock".

Accordingly, the Board may not legally make a final order in the Clayton Act proceedings which prohibits the consummation of the contracts for the sale of the assets of the 22 banks. Therefore, it has no right to seek a pendente lite order to the same effect. Where "a proposed transfer cannot be stopped" by the Board, "it should not be permitted to delay what it cannot prevent." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 515.

IV. This case presents an important question of the allocation of jurisdiction over the national banking system between the Federal Reserve Board and the Comptroller of the Currency.

The Comptroller of the Currency, administering the law (12 U. S. C. § 36) and applying published standards (12 C. F. R. § 4.5), authorized the opening of branches of petitioner Bank of America at twenty-seven locations occupied by the 22 selling banks. In so doing, he considered the public interest, including such questions of consequence to the operation of a sound banking system as the quality of the bank's management, the sufficiency of its resources, the ability of the new branch to serve and protect existing business, the competitive effect in relation to existing banking facilities, and the adequacy of business in the light of the population and economic character of the area. (See his affidavit, R. 254, 255). This action was taken pursuant to an historic jurisdiction conceded to be exclusive. See *Casey* v. *Galli*, 94 U. S. 673; *Schechter* v. *Sherwin*, 81 F. 2d 603 (CCA 7, 1936); *Benedict* v. *Anderson*, 70 F. 2d 227 (CCA 6th, 1934); *Liberty National Bank* v. *McIntosh*, 16 F. 2d 906 (CCA 4, 1927).

Having reached this determination, the Comptroller then made a firm commitment to the Bank of America that he would grant permits to operate new branches in connection with the acquisition of the assets and banking businesses of the twenty-two banks on condition that the bank raise additional capital. Such a commitment was necessary as a business matter since the Bank would otherwise have no basis for asking investors to supply additional capital. (R. 334). In reliance upon this commitment, 125,000 investors have paid in over $71,000,000. (R. 37)

The court below has directed a repudiation of the Comptroller's commitment at the insistence of the Federal Reserve Board, which has no official responsibility in the matter.

These petitioners believe that they and the investing public had a right to rely on the Comptroller's commitment. It is essential to the efficient operation of the banking system that the official who has exclusive general supervisory jurisdiction shall be authorized to make and keep commit-

ments incidental to the performance of his functions, without let or hindrance by any other government agency.

The court below did not even accord a presumption of regularity to the decision of the Comptroller that the opening of these branches incidental to the taking over of the assets of the twenty-two banks would be in the public interest. Plainly, the Comptroller's action should not be set aside, as it was by the court below, on the mere assertion of the Federal Reserve Board that it has pending before it proceedings in which it *may* reach a result inconsistent with the Comptroller's decision. Certainly the Comptroller's decision and his solemn commitment, like other official action, should not be abrogated unless he is a party to the proceeding and except on an affirmative showing of violation of law, or other invalidating cause.

Whether the Comptroller shall have authority to carry out solemn obligations made in good faith and relied on by the public, or whether supervisory power to nullify such commitments rests in the Federal Reserve Board and the courts upon the Board's petition in a case in which the Comptroller is not a party presents an important question which should be decided by this Court.

CONCLUSION.

For the reasons stated, and for the further reasons stated in the petition of Transamerica Corporation, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1950

APPENDIX A.

Section 7 of the Clayton Act (15 U. S. C., Sec. 18) in pertinent part reads as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Section 11 of the Clayton Act (15 U. S. C., Sec. 2) reads as follows:

> "Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers sub-

ject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any

time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

12 U. S. C., Sec. 1 states:

"There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury."

12 U. S. C., Sec. 36 in pertinent part reads as follows:

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . .

"(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

* * *

"(h) The words 'State bank,' 'State banks', 'bank', or 'banks', as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

APPENDIX B. (R. 3 to 7)

Petition for Temporary Restraining Order, Permanent Injunction, and Other Relief.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The Board of Governors of the Federal Reserve System (hereinafter called the Board) respectfully petitions this Court for relief appropriate to prevent the frustration of the Board's jurisdiction and that of this Court which will result if certain action, hereinafter described, now imminently threatened to be taken by respondents is consummated and effectuated. Jurisdiction to grant the relief sought is vested in this Court by Title 28 U. S. C., Section 1651 (formerly 28 U. S. C. 377).

In support of its petition, the Board, on information and belief, respectfully shows as follows:

(1) The Board is an independent agency of the United States Government created by Act of Congress of December 13, 1913 (38 Stat. 251, Ch. 6; 12 U. S. C. 221).

(2) Respondent Transamerica Corporation (hereinafter referred to as Transamerica) is a corporation organized under the laws of the State of Delaware, having its principal office in the City of San Francisco, State of California. Respondent Bank of America National Trust and Savings Association (hereinafter referred to as Bank of America) is a national banking association organized under the National Bank Act (12 U. S. C. 21), having its principal office in the City of San Francisco, State of California, and operating in excess of 500 branches located throughout the State of California.

(3) On June 24, 1948, the Board, acting pursuant to the provisions of Section 11 of the Clayton Act (15 U. S. C. 21) issued its Complaint against Transamerica, charging *inter alia* that the acquisition by that corporation of the capital stocks of various banks named in Paragraph 4 of the Com-